IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1790

SIMON BRACH, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

The Court of Appeals for the Second Circuit affirmed the judgment of conviction without opinion. Appendix A, p. 1a, *infra*. A petition for rehearing was denied without opinion. Appendix B, p. 2a, *infra*.

Jurisdiction

The judgment of the Court of Appeals was filed on April 1, 1976. A petition for rehearing was denied on May 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether federal jurisdiction exists under 18 U.S.C. § 659 as to a theft occurring *after* the receipt by the ultimate consignee of goods delivered to it from foreign commerce for transfer intrastate to its warehouse.

2. Whether the trial court erred in its rulings which denied defense counsel the right to argue the foreign commerce issue to the jury as a question of fact and in its instructions which amounted to a partial directed verdict of guilt on this issue.

Statutes Involved

18 U.S.C. § 659 provides in pertinent part as follows:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Statement of the Case

Petitioner was named in a one-count indictment charging him and one Itshak Bikel with violating 18 U.S.C. §§ 659 and 2 in connection with the theft of 166 cartons of car stereo units from a foreign shipment of freight. The defendants were tried separately. After trial by jury, petitioner was found guilty of theft in violation of 18 U.S.C. § 659 on October 28, 1975, and judgment was entered on December 19, 1975. Petitioner was sentenced to five years imprisonment. On April 1, 1975, the Court of Appeals affirmed the judgment of conviction without opinion.

The evidence at the trial showed that petitioner is the son of the owners of Fried Trading Company, the ultimate consignee of the shipment allegedly stolen. For a substantial period of time terminating in late 1974, petitioner had been employed in the Fried Trading Company, which is engaged in the business of wholesale marketing of electronic equipment. The business is located at 167 Clymer Street in Brooklyn, New York.

On March 5, 1975, the Fried Trading Company was to take possession of a shipment of car stereo units that had arrived at a Brooklyn pier from the Japanese manufacturer. The company sent one of its employees in a company-owned truck, as was its usual procedure, to pick up the shipment at the pier (App. 23a).* The employee-driver carried shipping documents that had been cleared through a Customs broker (App. 24a, 39a-40a).

The employee presented these documents at the pier, hired someone there to help in the loading, and supervised the loading of the shipment onto Fried's truck and its final clearance through Customs (App. 39a-44a).**

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* "App." refers throughout to the appendix filed with petitioner's brief on appeal below.

** The driver also testified that he was, as was customary on such pickups, free to choose his own route back to the Fried Trading Company, and that he did not even inform the pier authorities as to his ultimate destination (App. 44a).

The employee thereupon commenced the drive back to the premises of the Fried Trading Company, stopping once for coffee and to make a phone call (App. 45a-46a).* Arriving at the Fried Trading Company, he parked the truck approximately 50 feet from the entrance, removed two cartons from the shipment and took them inside to obtain instructions as to the further unloading of the truck. He was told to position the truck at the Company's unloading dock (App. 47a-49a, 33a, 48a-50a).

When he returned for the truck approximately ten to fifteen minutes later, he discovered it missing (App. 33a-34a, 48a).

Petitioner testified that he had, in fact, driven the truck away, and that he had done so because of a dispute with his family over his right to a share of the business profits and because of his belief that he was entitled to the contents of the truck (App. 100a-101a, 197a-198). Petitioner further testified that he did sell the goods later on that same day (App. 102a-107a, 198a).

At the close of the Government's evidence, petitioner moved, *inter alia,* for judgment of acquittal pursuant to Rule 29(a), Fed. Rules Crim. Proc., on the ground that the Government had failed, as a matter of law, to establish that the allegedly stolen goods remained in foreign commerce at the time of the theft. Petitioner contended that the foreign commerce nature of the shipment had ended as a matter of law, either at the point where Fried Trading Company's employee took possession of the goods at the pier, or when he parked the Company's truck containing the shipment near the Company's entrance and partially unloaded the shipment (App. 138a-156a). This motion was denied by the trial Court with the statement:

> . . . I don't say that this is going to be the final answer. In the Court of Appeals you may be successful because I will say *this is not a black and white case. It is a close case* and the decision of the Court of Appeals might be directly contrary to my decision (emphasis added) (App. 157a).

The Court also refused to charge the jury in accordance with one of petitioner's requests (App. 165a). The requested charge would have placed before the jury the issue of whether the shipment, in light of the evidence hereinabove summarized, should be found to have been delivered to the ultimate consignee as a matter of fact, and thus to have lost its foreign commerce characteristic (Appendix C, p. 5a, *infra*). In refusing so to charge, the Court ruled that the "delivery" issue was a matter of law, and that the jury must limit its inquiry to weighing the credibility of witnesses who had testified as to the parking of the truck in front of the Fried Trading Company (App. 166a-170a).

After a lengthy colloquy with counsel, the Court further ruled that defense counsel would not be permitted to argue circumstances of dominion, custody or control as indices of the factual existence of delivery (App. 171a-187a). The severity of the Court's restrictions may be illustrated by the following excerpts:

> *Mr. Youtt:* . . . I would propose to argue to the jury in substance the argument which I made to you and which you rejected, concerning the question of whether actual pickup at the pier constituted delivery as a matter of fact.
>
> *The Court:* You can't. You are now arguing law.
>
> *Mr. Youtt:* I would contend, your Honor, that is an issue of fact. (App. 165a-166a).
>
> • • •
>
> *Mr. Youtt:* I say the issue of delivery is a question which embraces the entire question of custody, con-

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* This, too, was customary Company practice (App. 47a), since the driver might be instructed to "take the truck, deliver someplace else," or to proceed with the unloading at Fried's warehouse (App. 52a-53a).

trol, dominion, whether they'd been released from customs, whether or not they—part of the goods had been removed.

The Court: No. I don't think we can do that. I am going to let—released from customs. I don't believe, as a matter of law, they can find that delivery was made. (App. 171a).

• • •

Mr. Youtt: There is the issue. If we are going to argue complete possession, shouldn't I be able to say that complete possession started when we directed the loading of the truck at the dock.

The Court: No. (App. 174a).

• • •

Mr. Youtt: If you have ruled, as a matter of law . . . that I am not entitled to a directed verdict—to a verdict of acquittal on that particular issue from the bench. However, what I would say is that leaves this question of delivery, which you've acknowledged is a close question, to be not merely a pure question of law, but rather a question of fact. If you say then in ruling—

The Court: No. (App. 176a).

• • •

Mr. Youtt: I say that dominion and control and total possession, evidence of that, starts at the point when the driver directs the loading of that particular shipment at the pier.

The Court: No.

Mr. Youtt: And continues when the driver stops for a cup of coffee and continues on—

The Court: No. I will say, as a matter of law, that is not so. If they so found it, I would set it aside if I could. I don't think I could because double jeopardy would prevent it and I will not have that. The answer to that is no. Because it is not so.

Mr. Youtt: I have no other way to argue.

The Court: Then you won't be able to do anything else about it except appeal to the Court of Appeals and have me reversed. (App. 184a).

The Court presented two charges to the jury on the foreign commerce element relating to whether federal jurisdiction was present: the first (App. 233a-235a) before the jury retired, and the second (App. 256a-260a) in response to a question from the jury during their deliberations. These charges are set forth in full in Appendix D, pp. 8a-11a, *infra*. Petitioner objected to both charges (App. 260a). The thrust of the Court's instructions may be illustrated by the following excerpts:

> [The foreign commerce characteristic] . . . continues until the merchandise arrives at its destination, that is, Fried's place of business, and is there delivered to the consignee by actual unloading or by presenting to the consignee complete possession over which he has complete domain at the time. Until that occurs, the shipment is still a foreign shipment. It is not enough just to stop in front of the Fried place of business. (App. 233a-234a).

The Court's final word on the subject, shortly after which the jury returned its verdict of guilty, was that a shipment remains in foreign commerce:

> . . . until the person has complete control of it. If it is unloaded, then it is no longer a foreign shipment.
>
> But the fact that it arrived at its destination at that moment does not mean it lost its characteristic as a foreign shipment.
>
> The fact that the truck stopped does not mean it lost its characteristic. (App. 260a).

On appeal to the Court of Appeals for the Second Circuit, petitioner raised, *inter alia*, the objections hereinabove

set forth. The judgment was affirmed without opinion. On petition for rehearing, petitioner again pressed the points here urged. That petition was also denied without opinion.

Reasons for Granting the Writ

1. The Court of Appeals' affirmance in the instant case represents a direct conflict with the decisions of other circuits and a conflict with that Court's own leading precedent on the foreign or interstate commerce issue. Further, it conflicts with this Court's decisions regarding the proper balance between federal and state criminal jurisdiction, thus sweeping into the federal courts a large band of larcenous conduct heretofore left to the states.

The jurisdictional requirement of 18 U.S.C. § 659 respecting goods

> moving as or which are a part of or which constitute an interstate or foreign shipment . . .

ought not be held satisfied here, where the ultimate consignee took complete possession and control of the shipment before the theft. Petitioner contends that "foreign commerce" ended at either of two points in the chronology of the instant events: (1) when Fried Trading Company's employee loaded the shipment onto a Fried truck at the Brooklyn pier and cleared the shipment through the Customs process; or (2) when, upon returning to Fried Trading Company, the employee parked the truck near the entrance of the business, removed some of the contents from the shipment, and left the truck unattended for some ten to fifteen minutes while he sought instructions as to the disposition of the remainder of the shipment.

a. The overwhelming weight of federal authority holds that foreign commerce ends where delivery to the consignee is effected; and delivery is effected, in the ordinary case, where the consignee picks up the goods from the

carrier. In *United States* v. *Jones,* 446 F.2d 48 (4th Cir. 1971), for example, a suitcase was stolen from airport baggage agents shortly before its owner appeared to claim it:

> While the baggage had arrived in the state of destination it had not been delivered to its owner, so that the interstate shipment was not yet complete. 446 F.2d at 49.

See also *United States* v. *Burton,* 475 F.2d 469 (8th Cir. 1973), *cert. denied,* 414 U.S. 835 (1973), where the act of checking baggage into the airport was held to commence interstate commerce:

> . . . an article delivered to a common carrier for shipment to another state is in interstate commerce from the time of its delivery to the carrier *until it reaches the consignee.* 475 F.2d at 472 (emphasis added).

Other circuits have likewise found commerce to end upon delivery to the consignee. In *Shaver* v. *United States,* 174 F. 2d 618 (9th Cir. 1949), the Court refused to permit a conviction for embezzling funds derived from an interstate shipment where the defendant truck driver had embezzled the funds paid him by consignees after delivery of the goods. The Court noted that the statute required a continuing flow of interstate commerce and declared:

> Although property is still in transportation in interstate commerce until delivery to the consignee, thereafter it is not in interstate commerce at all. 174 F.2d at 619.

See also *United States* v. *Yoppolo,* 435 F.2d 625, 626 (6th Cir. 1970) ("An interstate or foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered"). *United States* v. *Gimelstob,* 475 F.2d 157 (3rd Cir. 1973), *cert. denied,* 414 U.S. 828, *reh. denied,* 414 U.S. 1086 (1973), sheds further light on the meaning of "delivery". There, tin ingots arrived in foreign commerce and were held in the *shipper's* ware-

house under the original bills of lading. The Court's holding bears direct implications on the instant case:

> Here, *where the tin had not yet been picked up* [by the ultimate consignee] and was still being held under the original bills of lading, delivery had not yet occurred. 475 F.2d at 165. (emphasis added).

In the present case, the completeness of the delivery to Fried at the pier is indicated by the circumstances of the pick-up. Fried's own employee accepted the goods, supervised their loading onto a Fried truck, cleared them through customs, and chose his own route to Fried headquarters. It is difficult to imagine a more complete picture of custody and control. Thus the holding below that delivery had not been completed as a matter of law directly conflicts with the views of other circuits.

This conflict is dramatically illustrated by the case of *O'Kelley* v. *United States,* 116 F.2d 966 (8th Cir. 1941), a prosecution under the predecessor to § 659. In *O'Kelley* a quantity of sugar was stolen from a carrier's railroad car on the carrier's spur after the consignee had broken the carrier's seal to partially unload the sugar, replacing the seal with his own padlock. The Court found that the consignee had exercised exclusive dominion over the car and its contents from the time the seal was broken. Hence, the sugar was not in interstate commerce. Petitioner submits that the instant case presents even stronger facts than does *O'Kelley.* As in *O'Kelley,* the goods were exclusively under the dominion of the consignee. Unlike *O'Kelley,* where the carrier was at least implicated in control of the goods, there is here no colorable argument that the carrier's surrender and the consignee's control were anything but complete. Delivery was effected at the Brooklyn pier, and foreign commence ended at the pier.

Alternatively, the courts below should have held that foreign commerce ended when Fried's employee parked the shipment adjacent to the company's premises, removed two cartons from the shipment, and entered the building

for further instructions. When Fried's employee left the pier, he was free to travel any route to his destination.* He was under no direction from the carrier or pier employees, nor was he required to inform them of his plans (App. 44a). On his way to the Fried company he stopped for coffee and made a phone call. When he parked the truck at the Fried premises, if not well before, the shipment had clearly been "delivered" to the ultimate consignee in the fullest meaning of that term. See *O'Kelley* v. *United States, supra.*

b. A careful reading of Second Circuit authority, led by *United States* v. *Astolas,* 487 F.2d 275 (2d Cir. 1973), *cert. denied,* 416 U.S. 938 (1974), compels the conclusion that the holding below is also inconsistent with the Second Circuit rule. *Astolas* involved the theft of three tractor-trailers and their contents from interstate commerce. Two of the tractor-trailers had been cleared for shipment from the premises of a wholesaler *which acted as its own shipper.* The loads were sealed, bills of lading placed with them, and

> nothing else had to be done to ready the vehicles for transit; they were merely awaiting their assigned drivers. 487 F.2d at 277.

The third vehicle constituted an inbound shipment which had arrived after closing time the previous evening and stood, still sealed, with its bill of lading placed in the wholesaler's mailbox, awaiting the exercise of control by the wholesaler. The Court, faced with the question of drawing a line between the wholesaler's role as *consignor/consignee* and as *interstate carrier,* weighed all of the factors bearing upon the commencement and termination of interstate commerce, including, *inter alia,* the relationship of consignor, consignee and carrier, if separate entities, the

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* Indeed, his chosen destination did not match that appearing on customs documents, the Fried company having recently moved to a new address (See App. 44a and Gov. Ex. 8). The basic shipping documents bore no address whatsoever.

physical location of the shipment when stolen and whether ultimate delivery to the consignee had been made, and concluded that the three vehicles were in interstate commerce.

Astolas was heavily relied upon by the Government and the courts below, despite the important distinguishing and complicating factor present in that case: namely, the dual role of the wholesaler. Compare *United States* v. *Gollin,* 166 F.2d 123 (3rd Cir.), *cert. denied,* 333 U.S. 875 (1948), with *United States* v. *Fox,* 126 F.2d 237 (2d Cir. 1942). In the instant case, the courts below were never faced with the difficult question of whether and when Fried Trading Company dealt with the shipments *qua* foreign or interstate carrier, for the simple reason that, throughout the transaction, Fried acted *only* as ultimate consignee. *Astolas* is thus largely irrelevant to this case. The correct inquiry would have focused simply on when the shipment was delivered to Fried, and the *Astolas* Court itself stated that delivery occurs

> . . . either by actual unloading or by being placed to be unloaded. 487 F.2d at 278.

Here, the shipment was "placed" and "actually" unloaded at the Brooklyn pier, when it was removed from the vessel —not at the Fried Trading Company, where it stood in the *consignee's* vehicle. By applying *Astolas* to these very different facts, the Court of Appeals has converted Fried's employee-driver into a foreign commerce carrier, an anomaly supported neither by the language of the statute nor by that Court's own previous holdings.

Also inapposite are cases in which the interstate or foreign commerce characteristic has been found to continue after pick-up by or delivery to the consignee. These cases all involve additional factors which served either to vitiate the completeness of delivery or to bring into play another phase of interstate or foreign commerce. See, e.g., *United States* v. *Concepcion,* 419 F.2d 263 (2d Cir. 1970) (goods carried by consignee's bonded customs agent to bonded

customs warehouse were in the custody and control of Customs at least until cleared through and released from Customs); *United States* v. *Thomas,* 396 F.2d 310 (2d Cir. 1968) (although goods had been transported from pier to consignee's agent's warehouse, since most of the goods were scheduled for immediate shipment out-of-state, they could be considered part of one continuous foreign-interstate flow); *United States* v. *Schwartz,* 150 F.2d 627 (2d Cir.), *cert. denied,* 326 U.S. 757 (1945) (consignee who picked up foreign shipment in New Jersey for transport to its New York warehouse was in interstate commerce).

No such factors are present in the instant case to rebut petitioner's contention that foreign commerce ended as a matter of law when the ultimate consignee took complete possession of the shipment at the pier.

c. The judgment below works more than an inconsistency in the precedent of the Second Circuit and a sharp conflict with other circuits in the interpretation of "foreign commerce" as an element of the crimes proscribed by 18 U.S.C. § 659. It also extends federal jurisdiction into areas previously reserved to the States, in contravention of this Court's clear pronouncements as to the proper limits of federalism in criminal prosecutions.

Here, the "foreign commerce" requirement provides the essential nexus conferring federal jurisdiction over what would otherwise be a matter for state criminal law. The courts below, faced with two possible readings of this requirement, chose the one that permits the federal courts to reach a much wider range of conduct: *viz,* theft occurring after the ultimate consignee has commenced to exercise complete dominion over a foreign shipment. Although the limits of this expansion are difficult to define, it would seem clear that an interstate or foreign traveler, for example, arriving at his destination of residence, could be held the victim of federal crime if his suitcase were stolen after he claims it at the airport, or on his way to his home,

or even at his front porch as he prepares to enter. Cf. *United States* v. *Jones, supra.* On its face, § 659 requires no such result.

Thus, the judgment below runs afoul of a rule of construction long sanctioned by this Court:

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-222 (1952).

This rule was recently reaffirmed in *United States* v. *Bass,* 404 U.S. 336 (1971), where this Court held that the federal crime of receipt or possession of a firearm by a convicted felon required a nexus with interstate commerce. In *Bass,* the Court explained that the policies underlying the above "rule of lenity" included the need for "fair warning" of what conduct is proscribed and for avoiding the application of criminal sanctions except where the legislature has clearly spoken. 404 U.S. at 348. A further principle relied on in *Bass,* and applicable here, was the Court's reluctance, absent clear language, to find a Congressional purpose to alter significantly "the federal-state balance" or "to define as a federal crime conduct readily denounced as criminal by the States." *Id.* at 349; see also cases there cited at n. 16.

The same principle was cited in *Rewis* v. *United States,* 401 U.S. 808 (1971), where the Court refused to adopt an expansive interpretation of the Travel Act to reach gambling operations frequented by out-of-state bettors, as this

> . . . would alter sensitive federal-state relationships, could overextend limited federal policy resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. 401 U.S. at 812*

The same basic principles of federalism discussed in these decisions apply to the case at bar. There is a point beyond which federal jurisdiction should not extend, not simply to protect the accused from unwarranted intrusions and to assure that fair warning has been given, but also to provide a proper balance between federal and state domains.

In this case, that point should be the point at which the owner-consignee obtained release of the goods at the pier, loaded them into his truck and drove away toward a local destination of his choice. If not at that point, then certainly at the point when he parked his truck at his warehouse and partially unloaded it.

2. Having ruled against petitioner on the foreign commerce issue as a matter of *law,* the trial Court proceeded to withdraw from the jury virtually all latitude in deciding whether the shipment was stolen from foreign commerce as a matter of *fact.*

This was accomplished in two ways. First, the Court severely restricted counsel's latitude to argue to the jury those factual aspects of the case that bore on the nature and degree of the consignee's control over the shipment at the time of the theft (App. 164-187a). Second, the Court charged the jury in such manner as to, at best, confuse them, and, at worst, instruct them that foreign commerce could only be considered ended if they found that the goods had been completely unloaded into the consignee's

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* Most recently, in *Barrett* v. *United States,* —— U.S. ——, 96 S.Ct. 498 (1976), where the Court upheld a broad reading of one section of the Gun Control Act, the Court referred to 18 U.S.C. § 659 as one of a number of statutes which "utilize restrictive language" to reach "only direct interstate commerce." 96 S.Ct. at 501.

premises (See Appendix D).* Thus, petitioner was denied jury consideration of his argument that delivery to the consignee was complete and foreign commerce ended at the Brooklyn pier, as well as his secondary argument that foreign commerce ended where the truck was parked.

These rulings, tantamount to a partial directed verdict of guilt, violated petitioner's right to a jury trial and to proof beyond a reasonable doubt of each element of the crime. *Christoffel* v. *United States,* 338 U.S. 84 (1949); *In re Winship,* 397 U.S. 358 (1970); *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U.S. 395 (1946). The jury was entitled to resolve any controverted material factual issue. *Konda* v. *United States,* 166 F. 91 (7th Cir. 1908); *United Brotherhood of Carpenters and Joiners, supra,* 330 U.S. at 408.

Needless to say, the prohibition of closing argument on a controverted issue of fact seriously compounds the error. The Sixth Amendment guarantees to the criminal accused the assistance of counsel, which

> has been understood to mean that there can be no restriction upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.
>
> *Herring* v. *New York,* 422 U.S. 853, 857 (1975).

Within broad limits, counsel for both sides are entitled to argue inferences which they wish the jury to draw from the evidence. *United States* v. *Gerry,* 515 F.2d 130 (2d Cir. 1975); *United States* v. *Dibrizzi,* 393 F.2d 642 (2d Cir. 1968). Especially is this true when the inferences urged bear on a factual issue of central importance in the crime.

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* Petitioner's requested charge on the foreign commerce issue was twice denied (App. 165a, 251a).

Petitioner submits that such an issue was presented by the foreign commerce aspect of this case. Indeed, the foreign commerce issue comprised petitioner's principal defense, both legal and factual. Hence, there were two questions presented: the *jurisdictional* sufficiency of the foreign commerce nexus, and the adequacy of proof of foreign commerce as a *major element* of the crime. The first is a question of law for the court, the second a question of fact for the jury. Such was the holding in *Schwacter* v. *United States,* 237 F.2d 640 (6th Cir. 1956) which dealt with the issue of whether a stolen automobile was moving in interstate commerce at the time of a sale in violation of 18 U.S.C. § 2313:

> . . . its character of being a part of interstate commerce does not continue indefinitely after its transportation ends. After a period of time and depending upon what is done with the car, it may no longer be correct to treat it as moving in interstate commerce. 237 F.2d at 644.

For this reason, the interstate commerce characteristic is

> . . . a question of fact under the surrounding circumstances in each particular case. Being a question of fact it is for the jury to determine. *Id.*

See also *United States* v. *Pichany,* 490 F.2d 1073 (7th Cir. 1973); *United States* v. *Wetzel,* 488 F.2d 153 (8th Cir. 1973); *United States* v. *Briddle,* 430 F.2d 1335 (8th Cir. 1970); *United States* v. *Manuszak,* 234 F.2d 421 (3d Cir. 1956); *Parsons* v. *United States,* 188 F.2d 878 (5th Cir. 1951); *Grimsley* v. *United States,* 50 F.2d 509 (5th Cir. 1931); *Wolf* v. *United States,* 36 F.2d 450 (7th Cir. 1929); *Davidson* v. *United States,* 61 F.2d 250 (8th Cir. 1932).

Similarly, in prosecutions under 18 U.S.C. § 659 or its predecessors, the interstate or foreign commerce character of the shipment has been held a question of fact for the jury. *United States* v. *Langley,* 466 F.2d 27 (6th Cir. 1972); *Corey* v. *United States,* 305 F.2d 232 (9th Cir. 1962);

United States v. *Allegrucci,* 299 F.2d 811 (3d Cir. 1962); *United States* v. *Gollin,* 166 F.2d 123 (3d Cir.), *cert. denied,* 333 U.S. 875 (1948); *Murphy* v. *United States,* 133 F.2d 622 (6th Cir. 1943); *Goldstein* v. *United States,* 73 F.2d 804 (9th Cir. 1934). The instruction approved in *Murphy* v. *United States, supra,* is especially noteworthy. There the jury was told that if they found that the shipment had been left in the care of the railroad carrier at the time of the theft, then it was still in interstate commerce; but if they found that an employee of the consignee had picked up the shipment before it was stolen, then it was not an interstate shipment. 133 F.2d at 626.

Precisely such a question should have been preserved for the jury in the instant case. The jury should have been allowed to consider the factual circumstances hereinabove rehearsed to determine whether foreign commerce had ended at the Brooklyn pier, or alternatively at the Fried Trading Company. Foreign commerce having begun, the issue for the jury in this case was where and when did it end. See *Corey* v. *United States, supra.*

Defense counsel was not permitted to direct the jury's attention to this issue in his closing argument, and his requested instruction was denied. The judge charged the jury that foreign commerce *could not* have ended prior to the return of Fried's driver to the business premises, and only then if "there delivered to the consignee by actual unloading or by presenting to the consignee complete possession over which he had complete dominion at the time." (App. 233a-235a).*

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* It should be noted that the court's handling of the charge in the later trial of the co-defendant, Itshak Bikel, on January 21, 1976, reflects a subtle change in the court's position. There, in response to the jury's question as to what constitutes dominion, the court instructed that dominion merely means

> . . . that the consignee had now complete possession of his

(*footnote continued on following page*)

These errors amounted to a partial directed verdict of guilt on the most strongly contested issue in the case. As such, they demand reversal of petitioner's conviction and the granting of a new trial. Even if petitioner is not entitled to acquittal on the foreign commerce issue as a matter of law, he should be permitted the verdict of a jury that has fully considered these essential facts of the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(*footnote continued from preceding page*)

> shipment in the sense that he was able at that moment to physically dispose of it or transfer as well.
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> • • •
>
> You determine when this truck was double-parked out there for that five minutes, whether he had control and possession and dominion of it, so that he could dispose of it and transfer it immediately himself. It doesn't mean legal ownership. It means possession and power at that time, at that moment. The timing is important. (Charge to Jury in United States v. Itshak Bikel, 74 CR 782 [January 21, 1976]).

It is significant to note that not long after this explanation was given the jury returned its verdict of not guilty for the co-defendant.

Appendix A—Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of April one thousand nine hundred and seventy-six.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. ROBERT P. ANDERSON
HON. THOMAS J. MESKILL
Circuit Judges.

76-1030

United States of America,

Plaintiff-Appellee,

v.

Simon Brach,

Defendant-Appellant,

Itshak Bikel,

Defendant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Appendix A—Judgment of the Court of Appeals.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

by
Vincent A. Carlin
Chief Deputy Clerk

Appendix B—Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-six.

Present: Hon. Irving R. Kaufman
Chief Judge
Hon. Robert P. Anderson
Hon. Thomas J. Meskill
Circuit Judges.

76-1030

United States of America,
Plaintiff-Appellee,

v.

Simon Brach,
Defendant-Appellant,

Itshak Bikel,
Defendant.

A petition for a rehearing having been filed herein by counsel for the appellant, Simon Brach,

Upon consideration thereof, it is

Ordered that said petition be and hereby is Denied.

A. Daniel Fusaro
Clerk

Appendix B—Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-six.

76-1030

United States of America,

Plaintiff-Appellee,

v.

Simon Brach,

Defendant-Appellant,

Itshak Bikel,

Defendant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Simon Brach, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

Appendix C—Defendant's Second Request to Charge.

REQUEST NO. 2

The facts that the shipment had been released by Customs, that it had been picked up by the ultimate consignee, that it had arrived at the location of delivery, and that it had been partially unloaded are all factors which tend to support a finding that the shipment had been "delivered" at the time they were taken. If indeed they were delivered at that time, they no longer constituted a foreign shipment. If you find any such facts to exist and if the existence of such facts creates a reasonable doubt that the shipment constituted a foreign shipment at the time of the theft as charged in the indictment, then you must find the defendants not guilty.

United States v. *O'Kelley,* 116 F. 2d 966 (8th Cir. 1941);
United States v. *Gimelstob,* 475 F. 2d 157 (3rd Cir. 1973);
United States v. *Concepcion,* 419 F. 2d 263 (2d Cir. 1970);
United States v. *Jones,* 446 F. 2d 48 (4th Cir. 1971);
United States v. *Astolas,* 487 F. 2d 275 (2d Cir. 1973);
United States v. *Yoppolo,* 435 F. 2d 625 (6th Cir. 1970).

Appendix D—Trial Court's Jury Instructions on the Foreign Commerce Issue.

Now, the elements of this offense as appears from Section 659 of Title 18 of the United States Code are (1) willful and knowing theft or unlawful taking of goods moving as and constituting an interstate or foreign shipment of freight. And (2) intent to convert the same to the defendant's own use.

Two elements: Willful and knowing theft or unlawful taking of goods moving as and constituting an interstate or foreign shipment of freight. That is the first one.

(2) Secondly, intent to convert the same to the defendant's own use.

The burden is upon the Government to prove beyond a reasonable doubt both of these elements and failure to do so is fatal to the prosecution and entitles the defendant to a verdict of acquittal.

Now, it is not necessary for the Government, however, to prove that the defendant knew that the goods were a part of a foreign shipment of freight. He did not have to know that. It is sufficient if you find, as a matter of fact, that actually the goods were moving in and were part of or did constitute a foreign shipment, and while waybills and other shipping documents of such shipment are prima facie evidence of deliveries from which and to which such shipment was made, there still remains a question which you must decide and that is whether in actuality a real delivery was made of this foreign shipment to Fried's place of business before the shipment was stolen.

Now, in this case, the evidence was that the Fried delivery vehicle stopped 50 feet short of the entrance to Fried's place of business on Clymer Street in Brooklyn, which is a public street.

The foreign character of the property stolen is an essential element to this offense. In this connection, shipment commences at the time the property or the cartons

were placed on the ship in Yokohama for foreign commerce and thereafter it comes into possession of those who are assisting its course in this foreign transportation. And this foreign shipment continues until the merchandise arrives at its destination, that is, Fried's place of business, and is there delivered to the consignee by actual unloading or by presenting to the consignee complete possession over which he has complete dominion at the time.

Until that occurs, the shipment is still a foreign shipment. It is not enough just to stop in front of the Fried place of business. If you find beyond a reasonable doubt that the cartons were shipped from Yokohama, Japan, were picked up at the pier by one of Fried's drivers, and that Fried's truck was then driven to its place of business where the truck stopped in front of or 50 feet from the Fried's place of business on Clymer Street, which is a public street, and that the shipment was stolen immediately after the driver left the truck for the purpose of delivering two cartons to Fried, then you may find that this shipment remained in foreign commerce at the time of the theft.

On the other hand, if you find that at the time the truck stopped at Clymer Street near Fried's place of business, that in actuality the Fried Trading Company had complete possession, dominion and control over the truck and the cartons, then you may find that the shipment was no longer in foreign commerce at the time of the theft.

The issue in this regard is whether Fried had at the time such complete possession and dominion of the truck before it was stolen and it was no longer in foreign commerce.

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Appendix D—Trial Court's Jury Instructions on the Foreign Commerce Issue.

QUESTION FROM JURY

(The following occurred in the absence of the Jury, at 3:20 p.m.)

The Court: I have a statement here from the Jury. It says "Someone not sure whether it is a Federal case or not. Please explain."

I'll put it on the record. I don't know who the someone is.

Bring in the Jury.

The Clerk: Court's Exhibit 1, Jury note, "Someone not sure whether it is a Federal case or not. Please explain."

(So marked.)

(Jury present.)

The Court: I have a note from the Jury which reads, "Someone not sure whether it is a Federal case or not. Please explain."

Ladies and gentlemen, the term "Federal case" has many meanings and is confusing.

You are not to decide whether or not it is a so-called Federal case. This Court is trying the case.

Therefore, it is within the jurisdiction of this Court and that is not the issue for you to decide.

What you are to decide, however, is whether or not this defendant is guilty as charged, and one of the elements you must decide is whether or not at the time of the alleged theft the shipment was still a part of a foreign shipment.

That is the issue. You understand?

You do not talk about Federal cases because that will not help you. We sometimes refer to a Federal case in meaning so many other things. So, forget Federal case.

Now, let me again—I can repeat what I said as to this foreign shipment aspect. That is the issue.

Appendix D—Trial Court's Jury Instructions on the Foreign Commerce Issue.

Let me see. If you wish, I will refer to my other charge as to the shipment of the cartons from Yokohama, Japan. Picked up at the pier by one of Fried's drivers. Fried's truck was driven to the place of business where it stopped in front of or 50 feet from Fried's business on Clymer Street, which was a public street, and that immediately thereafter, the shipment was stolen allegedly, after the driver left the truck to deliver two cartons to Fried.

I say if you find that, you may find that this shipment remained in foreign commerce at the time of the theft.

I said, if you find that at the time the truck stopped at Clymer Street, Fried or near Fried's place of business, that Fried Trading Company had complete control—possession and control of both the truck and its contents, then you may find that the shipment was no longer in foreign commerce at the time of the theft.

The issue in this regard is whether Fried had complete control and possession, dominion of the truck when it stopped at Fried's place of business.

Now, the fact that Fried owned the truck or had a right to actual physical possession of the truck and its contents does not mean that the truck was no longer in foreign commerce.

Only after there has been a delivery, that is, a complete physical possession and control of the shipment to the consignee, which in this case was Fried Trading Company will the shipment lose its characteristic of foreign commerce.

Arrival of the truck at its destination does not mean that the shipment has lost its characteristic as a foreign shipment.

Have I made that clear? I mean, there must be something more. It must be completely delivered into the hands of the consignee and he has possession. If it does not, it has not lost its foreign control, foreign shipment.

Appendix D—Trial Court's Jury Instructions on the Foreign Commerce Issue.

That is the only thing you decide. You do not decide whether it is a Federal case or State case. That is not before you.

Otherwise, if it was not a Federal case or at least as that term is used, I would not be here. You would not be here. But we are going to decide whether the Federal statute has been violated.

That's it. It was shipped—well, this young lady says she does not seem to understand it yet.

Juror No. 3: Are you talking to me?

The Court: Yes.

All right. If you do not, I am willing to do anything else I can to help you.

Juror No. 3: I understand it and I do not understand it, to be very honest.

The Court: I will say this to you, that the concept of foreign commerce in the context of a statute is a little different than what we understand that term to mean.

It does mean that the shipment does not lose its characteristic as a foreign shipment until the person has complete control of it. If it is unloaded, then it is no longer a foreign shipment.

But the fact that it arrived at its destination at that moment does not mean it lost its characteristic as a foreign shipment.

The fact that the truck stopped does not mean it lost its characteristic.

It is not necessary for the wheels to go around to constitute part of a foreign shipment. I cannot help you, I don't think, any more.

Thank you.

(The following occurred in the absence of the Jury.)

The Court: Yes. It is a difficult concept.

Mr. Youtt: Again, your Honor, I would enter my objection on behalf of the defendant to that characteristic.

Appendix D—Trial Court's Jury Instructions on the Foreign Commerce Issue.

The Court: Yes, I think I suspected you would and I put it down, that you object to that definition. But you have something to say, Mr. Appleby?

Mr. Appleby: No, your Honor.

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No. 75-1790

In the Supreme Court of the United States

OCTOBER TERM, 1976

SIMON BRACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

T. GEORGE GILINSKY,
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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 1, 1976. A petition for rehearing was denied on May 14, 1976 (Pet. App. 3a). The petition for a writ of certiorari was filed on June 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether goods stolen by petitioner were an "interstate or foreign shipment," within the meaning of 18 U.S.C. 659, at the time they were stolen.

2. Whether the district court properly instructed the jury on the commerce element of 18 U.S.C. 659.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of stealing goods worth approximately $50,000 from a shipment travelling in foreign commerce, in violation of 18 U.S.C. 659. Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed without opinion.

On March 5, 1975, Israel Follman, a truck driver employed by the Fried Trading Company, drove a Fried truck to Pier 12 in Brooklyn, New York, to pick up a shipment of car stereo units that had just arrived from Japan. After Follman presented the proper documents to customs officials, he had the stereo units loaded onto the truck and drove the truck back to the vicinity of the Company; he parked the truck approximately 50 feet from the Company's premises (App. 23a-30a).[1] He delivered two cartons (from the shipment of 166 cartons) to Company technicians, so that they could determine whether the merchandise was defective. Defective merchandise could be returned to the seller immediately (App. 30a-33a). When Follman returned to the street approximately ten minutes later, the truck was missing (App. 33a).

Petitioner, a member of the family that owns and operates the Fried Trading Company, was arrested for stealing the truck. Petitioner confessed and stated that he "fenced" the stolen stereos for $20,000 (App. 91a-104a). At trial petitioner again admitted taking the truck (App. 193a-194a); he claimed that he had done so because of a dispute with his family over his right to a share of the Company's profits (App. 195a-198a).

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[1] "App." designates petitioner's Appendix in the court of appeals.

ARGUMENT

1. Petitioner contends that the stereo units were not a "foreign shipment" within the meaning of 18 U.S.C. 659 when he stole them.

a. Petitioner first urges (Pet. 8-10) that because the shipment was loaded at the pier onto a truck owned and operated by the consignee of the goods, it lost its foreign character at that moment. But "[a]n interstate or foreign shipment does not lose its characteristic until it arrives at its final destination and is there delivered." *United States* v. *Yoppolo,* 435 F. 2d 625, 626 (C.A. 6); *United States* v. *Gimelstob,* 475 F. 2d 157, 164 (C.A. 3), certiorari denied, 414 U.S. 828. Cf. *Brown* v. *Maryland,* 12 Wheat. 419, 442-443 (implying that a thing remains in foreign commerce while still in the warehouse of the importer); *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276. It is not known what the "final destination" of the stereo units may have been, but their immediate destination was the Fried Trading Company's warehouse, and they had not yet reached even that destination. Wherever the "final destination" was, it was not Pier 12 in New York. The fact that the goods were being transported by their owner on the last leg of their international journey at the time of the theft did not remove them from the protection of Section 659. *United States* v. *Astolas,* 487 F. 2d 275, 280-282 (C.A. 2), certiorari denied, 416

U.S. 955; *Winer* v. *United States*, 228 F. 2d 944 (C.A. 6), certiorari denied, 351 U.S. 906.[2]

b. Petitioner alternatively argues (Pet. 10-12) that the goods lost their foreign character when Follman parked the truck on the street near the Fried warehouse and carried two of the boxes to the warehouse. But petitioner stole the boxes remaining in the truck, not the boxes taken to the warehouse. The units simply never arrived at their intended destination; they were diverted by petitioner, and the fact that they came within 50 feet of their destination is immaterial. *United States* v. *Astolas*, *supra*; *United States* v. *Cousins*, 427 F. 2d 382 (C.A. 9). Indeed, Follman testified that he removed the two boxes so that company personnel could determine whether the shipment was defective and whether to accept the shipment or return it. This is persuasive evidence that its journey had not yet come to an end.[3]

[2]Petitioner attempts to portray a conflict among the circuits (Pet. 9-13), but there is none. Most of the cases cited by petitioner (*e.g.*, *United States* v. *Burton*, 475 F. 2d 469 (C.A. 8), certiorari denied, 414 U.S. 835) (see Pet. 9) affirm convictions under Section 659, and so do not stand for the proposition that petitioner's conviction would have been reversed by those courts. There appears to be a consensus that interstate or foreign commerce continues until the shipment reaches its destination. The apparent disagreement upon which petitioner dwells concerns not the general principle but only its application to particular facts; identifying the "destination" of particular goods may be a difficult question about which reasonable men may differ, but such problems of identification on particular facts do not require resolution by this Court.

These observations also demonstrate why, contrary to petitioner's assertion (Pet. 11-13), there is no conflict within the Second Circuit. *Astolas*, *supra*, upon which petitioner relies (Pet. 11-12), made it clear (487 F. 2d at 278-282) that the critical inquiry under Section 659 is not how many vehicles transport the goods or by whom the vehicles are owned, but whether the goods have reached their final destination before being stolen. In any event, any conflict among decisions of the same court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

2. Petitioner contends (Pet 15-19) that the district court improperly restricted defense counsel's closing argument on the issue whether the goods constituted a foreign shipment at the time they were stolen and erroneously instructed the jury on the same issue.

The crux of petitioner's argument apparently is that the jury should have been instructed that they could find that the goods lost their foreign character when they were loaded onto the Fried truck at the pier, and that he should have been permitted to argue that theory to the jury during closing argument. There is no right, however, to argue erroneous legal theories to the jury, and for the

[3]Petitioner contends (Pet. 10) that the holding below conflicts with *O'Kelley* v. *United States*, 116 F. 2d 966 (C.A. 8). That decision has not been followed by other circuits (*e.g.*, *Winer* v. *United States*, 228 F. 2d 944 (C.A. 6), certiorari denied, 351 U.S. 906; *United States* v. *Concepcion*, 419 F. 2d 1263 (C.A. 2)) and has been virtually abandoned even by the Eighth Circuit. See *Chapman* v. *United States*, 151 F. 2d 740 (C.A. 8). In *O'Kelley* a carload of sugar originating in Louisiana was set out on a spur track at a railroad station in Arkansas. The next day, the consignee of the sugar broke the car seal, removed approximately one-sixth of the shipment, and replaced the seal with its own padlock. When the consignee returned to complete the unloading the next day it discovered that a small quantity of the sugar had been stolen. In holding that the sugar was no longer in interstate commerce at the time it was stolen, the court concluded that the consignee had "accepted" the shipment by breaking the seal, removing part of the shipment, and by locking the car with a private padlock. Confronted with virtually identical facts four years later in *Chapman*, the Eighth Circuit distinguished *O'Kelley* on the ground that the railroad car involved in *Chapman* had been resealed by the railroad company after the consignee had removed part of the shipment and accepted delivery. We doubt that *O'Kelley* would be followed by the Eighth Circuit today even on its own facts.

reasons we have discussed above the transfer of the stereo units to the Fried truck was not the end of foreign commerce.

Petitioner relies on a battery of cases (Pet. 16-18) for the proposition that the jurisdictional elements of the statute present questions of fact for the jury. We agree. The judge instructed the jury that it must acquit petitioner if it concluded that Fried Company had assumed "such complete possession and dominion" of the truck and its contents at the time and place of the theft that the goods had been delivered and were no longer in transit (Pet. App. 7a). The district court was not required to go further and give an instruction based upon petitioner's erroneous construction of Section 659.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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RICHARD L. THORNBURGH,
Assistant Attorney General.

T. GEORGE GILINSKY,
MICHAEL E. MOORE,
Attorneys.

SEPTEMBER 1976.

DOJ-1976-09